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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 552.

STATE OF FLORIDA EX REL. CARROLL DUNSCOMBE, PETITIONER,

VS.

HONORABLE A. O. KANNER, AS JUDGE OF THE CIRCUIT COURT FOR MARTIN COUNTY, FLORIDA, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

REPLY BRIEF OF PETITIONER

and

~~**PETITION ON REHEARING ON ORDER DENYING**~~ **PETITION FOR REHEARING.**

T. T. OUGHTERSON,
Stuart, Florida,
Attorney for Petitioner.

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REPLY BRIEF OF PETITIONER.

The respondent in his reply brief suggests the remedy to forbid a trial court in proceeding where the law says; it shall not; is adequate by going to the expense of defending the case and taking a lot of testimony and then determine by appeal if the court had any jurisdiction to proceed after noncompliance with the conditions precedent

had been brought to the attention of the court and the nonresident plaintiff had refused to obey the law.

In order to support this contention the respondent cites *State ex rel. Lynch* v. *Circuit Court*, 159 So. 883, 118 Fla. 507.

The record in that case shows that the action was started before the law restricting such suits had been passed, but that before the court permitted the plaintiff to proceed it corrected the default and got its receipt from the Secretary of State that it had complied and therefore the trial court could not have erred in allowing the suit to proceed.

The Florida Supreme Court went into that very question shortly before then in *Hogue* v. *Morrison*, 156 So. 377, 95 A. L. R. 357, and pointed out the statute did not forbid filing the suit, the law was it could not maintain it in the absence of compliance. This is a default a defendant can waive, but when the failure to post the cost bond or pay the excise tax is called to the court's attention, the law is that the action *cannot further proceed* and this restriction applies to the judge, and as stated in *Irwin* v. *Gilson*, 158 So. 77, the court can't require a defendant to plead while the nonresident plaintiff is in default and if no attempt is made to comply, the action is properly dismissed.

As the *Hogue* v. *Morrison* case points out, that is the penalty for noncompliance.

These are simply conditions precedent to entitle a foreign corporation to maintain an action over the objection of a defendant when, as in this case, it is raised; the action abates pending the 30 day period for compliance and if at the end of such time no attempt has been made, the law requires the court to dismiss the action.

1 Amer. Jur. 20, Sec. 13:

> "The question of a corporation's legal disability should be raised by plea or motion as local practice prescribes."

Sec. 58.01 provides for a motion to dismiss upon failure to comply.

In fact the action abates during this period and when that has passed, the trial court loses all jurisdiction to do other than dismiss for refusal to comply.

17 Amer. Jur. 84, Sec. 48, Note 3.

If at any stage of the proceedings it is made to appear the court has no jurisdiction of the subject matter the court should dismiss it.

42 Amer. Jur. 162, Sec. 25.

Jurisdiction that once has confessedly attached may subsequently terminate and when this happens the court is as destitute of jurisdiction as if it never existed.

The facts in *Federal Land Bank* v. *Priddy,* 295 U. S. 229, were very similar. In that case the defendant claimed the trial court was without jurisdiction, the court denied the suggestion and prohibition was taken to forbid the exercise of such jurisdiction and it was not suggested that the petitioner had an adequate remedy by waiting until a final judgment to take an appeal to determine that question, but this court granted certiorari to review. The same worded statute as to what constituted a foreign corporation was before the court in that case and the courts of that state had construed it in the same manner as had the Florida Supreme Court in the case now before the court. It held it was a foreign corporation and the law of Florida is that a trial court has no jurisdiction to proceed where the noncompliance is called to its attention and the default not corrected.

Crill v. *State Road Department,* 117 So. 795, cited by the respondent was not based on any law forbidding prosecution of that action nor on any holding that the act under which the plaintiff proceeded was unconstitutional. What

was attempted was to have the trial court determine the constitutionality of the act upon which the right to base the pending action, in the absence of any showing that the Supreme Court had found it to be unconstitutional. But the Florida Supreme Court has determined that a foreign corporation can't prosecute its action over the objections of a defendant until it has complied so that case in no way supports the respondent.

Curtis v. *Albritton,* 132 So. 677, likewise fails to support. In that case the bank had been sued for a sum claimed by two different parties and as usual, it filed an interpleader and paid the money into court and asked the claimants settle their rights in that action. The defendant had an ample remedy in the interpleader to prove his superior claim to the money and as the 17th and 18th headnote points out the jurisdiction of the judge to determine the issues in the interpleader action was not questioned. No one suggests that the defendant in that action could not have had his rights determined in that action or that the judge was not authorized to try it, but you have an entirely different situation where the law forbids a judge from proceeding with an action and where his right to do so is questioned. The court had already held in the *Hogue* v. *Morrison* case that a trial court was without jurisdiction to permit the further prosecution of such a claim.

42 Amer. Jur. 165, Sec. 29:

> "A writ of prohibition may issue where the petitioner has no other adequate remedy, although the judge may be acting within his *technical* jurisdiction in hearing and determining the case."

Many situations arise where a court may have jurisdiction of the subject matter or parties but for some reason may have lost it or be estopped to go into that particular matter.

He may be disqualified but refuse to admit it, *State* v. *McAllister*, 214 S. W. 85, 8 A. L. R. 1226; 136 A. L. R. 731, or the defendant may have been enticed into the state in order for process be served upon him. *State* v. *District Court*, 33 Pac. 2d 526, 93 A. L. R. 865, or from any one of a great number of reasons he may either lack jurisdiction or it be improper he attempt to exercise it in the particular matter then before him.

If as in the *Lynch case*, 159 So. 883, the plaintiff had corrected the default, there could be no question that the trial court had jurisdiction to proceed but if as in this case the plaintiff refused to comply there would be no purpose of passing the law that forbids further prosecution, if trial courts are not going to enforce that law when its attention is called to the breach.

The law does not forbid filing the action, it forbids the court permitting the noncomplier from proceeding with his action while in default.

No attempt has been made in the reply brief to show that in such cases the nonresident corporate plaintiff is entitled to maintain its action under such circumstances and there are no cases that so hold, nor is any authority stated that permits a circuit judge to allow the action to proceed and require the defendant to plead or answer over his objections in the face of its noncompliance, and there are none.

Nor does the respondent cite any authority that shows that if the law forbids further prosecution in the absence of noncompliance the trial judge can disregard the law and permit the action to proceed, or that a defendant in such a case can be required to go to a lot of time and expense and then must wait until some final judgment is rendered and take an appeal to ascertain if the trial judge had no jurisdiction to allow the action to be prosecuted and was in fact permitting the plaintiff to break the law.

Want of jurisdiction is always good grounds for prohibition, because a defendant is entitled to have that question determined at the outset and does not have to wait for a final judgment and take an appeal to determine. If as in the Leach case, it appears from the record the court has jurisdiction to proceed and that opinion points out there is no defect, both parties then know any judgment will be valid as far as the right of the court to make it is concerned.

The reply brief in substance admits all the petitioner claims but cites no law or authority to show why he was not entitled to the relief he sought.

Respectfully submitted,

T. T. OUGHTERSON,
Stuart, Florida,
Attorney for Petitioner.

MOTION TO STRIKE.

Comes now the petitioner by his undersigned attorney, and moves to strike the alleged order of W. I. Myers from the reply brief of the respondent, said order being dated September 30th, 1937, and appearing on pages 10-13 of said reply brief and on the following grounds:

1. That said alleged order is not properly attested to be entitled to introduction into evidence, even had it been offered in the trial court.

2. That it does not appear said alleged order is part of the record in this cause or was ever before the trial or appellate court.

3. That it attempts to make this court one of original jurisdiction to determine a question that was never before the court below and as such, fails to provide for due process of law.

4. Article Six of the United States Constitution requires judges of the several state courts to take judicial notice of the Constitution and the laws and treaties of the United States but does not require them to take judicial notice of orders or rules of Federal corporations and if the plaintiff wanted the benefit of any such rule or order its duty was to offer it before the trial court and allow the defendant to attack its validity or show it was in fact no longer in effect.

T. T. OUGHTERSON,
Stuart, Florida,
Attorney for Petitioner.

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PETITION ON REHEARING ON ORDER DENYING PETITION FOR REHEARING.

Comes now the petitioner by his undersigned attorney and respectfully moves the court to grant him a rehearing of its order denying certiorari of the decision rendered in this cause and for the following reasons:

1. The laws of Florida forbid a trial judge to permit an action by a nonresident corporation, that is in default for paying the required excise tax or posting the cost bond, to proceed over the objections of the defendant.

2. That in the action before the court, the trial judge was without jurisdiction to permit further prosecution of said action and therefore prohibition was the proper remedy.

3. The case cited by the respondent in order to support the unlawful requirement the defendant plead; by the recitals therein stated; shows that the foreign corporation had complied with the law and paid the required tax and therefore the trial court would have erred had it refused to permit the action to proceed.

4. No law or authority has been cited that permits a nonresident corporation that has failed to pay the stock tax or post the required cost bond, to proceed in its action over the objection of the defendant.

5. No law or authority has been cited that shows the plaintiff in the action complained of was exempt from the same obligations as those it competes with are required to perform.

6. That the matter was determined before the petitioner could have his reply brief printed and call these matters to the attention of the court and therefore petitioner asks leave of the court to support this petition by the reply brief he had prepared and intended to file, before the matter was determined.

T. T. OUGHTERSON,
Stuart, Florida,
Attorney for Petitioner.

I, T. T. Oughterson, hereby certify that the foregoing petition is filed in good faith and not for the purpose of delay and said petition is restricted to the grounds therein stated.

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